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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUPPERT, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

THE HERSHEY COMPANY,

Defendant.

Civil Action No. 7:16-cv-7338

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Christopher Huppert, by and through his counsel, Denlea & Carton LLP, respectfully files this Class Action Complaint on behalf of himself and a class of similarly-situated individuals who have purchased “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds or Hershey’s Kisses Cookies ‘N’ Crème manufactured and/or marketed by The Hershey Company (“Hershey”) that contain less than 12 ounces net weight of product, and alleges as follows:

NATURE OF THE CASE

1. Few sights in American supermarkets are more familiar and beloved than bags of delicious Hershey’s Kisses. Hershey’s Kisses, as virtually everyone knows, are bite-sized pieces of chocolate having a distinctive shape – commonly described as flat-

bottomed teardrops – which are wrapped in squares of lightweight aluminum foil and are topped with a narrow pennant of paper protruding from the top.

2. Hershey's Kisses were first introduced in 1907 by the Hershey Company ("Hershey"), the iconic American chocolate maker, and for 110 years, Hershey's Kisses have been a favorite American treat.

3. Hershey's Kisses were originally made solely of milk chocolate, and milk chocolate Hershey's Kisses remain the mainstay of the brand today. But Hershey also offers a number of varieties of Hershey's Kisses, including milk chocolate with almonds; cookies 'n' crème; and milk chocolate with caramel, among others.

4. Hershey packages Hershey's Kisses in several types of bags and boxes. One of the most common bags in which Hershey offers its Kisses is the "Classic Bag."

5. Presently, Hershey sells Hershey's Kisses Milk Chocolate; Hershey's Kisses Cookies 'N' Crème; and Hershey's Kisses Milk Chocolate with Almonds in its "Classic Bag."

6. Hershey offers its "Classic Bag" of Hershey's Kisses Milk Chocolate packaged in a non-transparent plastic bag, with a small transparent window at the bottom right of the packaging through which consumers can see several delectable Hershey's Kisses. At the bottom center of the front of the bag, the net weight of 12 ounces is displayed in small print.

Classic Bag
HERSHEY'S
KISSES
brand
since 1907
milk chocolate
PER 9 PIECE SERVING
200
NET WT 12 OZ (340 g)

7. Hershey also sells "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds and Hershey's Kisses Cookies 'N' Crème in plastic bags that appear to consumers to be the same size as "Classic Bags" of Hershey's Kisses Milk Chocolate. For all intents and purposes, each "Classic Bag" of Hershey's Kisses (regardless of its flavor or variety) looks the same to consumers.

Classic Bag
ALMONDS
HERSHEY'S
KISSES
milk chocolate with almonds
NET WT 11 OZ (311g)

Classic Bag
COOKIES
HERSHEY'S
KISSES
Cookies'n'Creme
NET WT 10.5 OZ (297 g)

8. Consequently, consumers have come to rely upon Hershey's "standard size" 12 ounce net weight "Classic Bag" packaging when making purchasing decisions. Consumers have come to expect that they will receive 12 ounces net weight of Kisses when they buy Hershey's Kisses in the standard size "Classic Bag" packaging, whatever variety they purchase. And significantly, this expectation is reinforced by Hershey because the sale price of a "Classic Bag" of Kisses (regardless of flavor or variety) is the same.

Classic Bag
KISSES
Reg. Price: ~~$4.39~~
Sale Price: $3.99

Classic Bag
ALMONDS
Reg. Price: ~~$4.39~~
Sale Price: $3.99

Classic Bag
COOKIES
Reg. Price: ~~$4.39~~
Sale Price: $3.99

9. But rather than fill these visually identical-size bags with the same quantity

of Kisses --12 ounces (net weight) per bag -- that customers have long been accustomed to receiving, Hershey has reduced the contents of the "Classic Bags" for Hershey's Kisses Milk Chocolate with Almonds by 8 1/3 percent, and under filled the bags with only 11 ounces (net weight) of Kisses.

10. Similarly, for "Classic Bags" of Hershey's Kisses Cookies 'N' Crème, Hershey fills the bags with 10.5 ounces (net weight) of Kisses, underfilling them by 12 1/2 percent as compared to "Classic Bags" of the hallmark Hershey's Kisses Milk Chocolate. Yet the retail sales price for each variety of Hershey's Kisses sold in "Classic Bags" is the same.

11. By marketing its "Classic Bags" of Hershey's Kisses in this manner, Hershey has been able to deceive consumers and secretly impose a price premium on the sale of its Hershey's Kisses Milk Chocolate with Almonds and its Hershey's Kisses Cookies 'N' Crème chocolates sold in "Classic Bags."

12. On store shelves, the "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème are typically stacked next to the traditional Hershey's Kisses Milk Chocolate "Classic Bags," and to a consumer, they appear to be the same size. Thus, reasonable consumers are led to believe that they are buying the same amount of Hershey's Kisses when they buy the specialty varieties of Hershey's Kisses as when they buy "Classic Bags" of the traditional Hershey's Kisses Milk Chocolate which contain 12 ounces net weight of Kisses. While the question is, of course, rhetorical, why else would Hershey sell all three varieties, in a similarly adorned package labeled the "Classic Bag" at the same price, if not to create the impression that consumers are merely choosing between three different flavors but receiving the same

quantity of product.

Classic Bag
KISSES
KISSES
HERSHEY'S
KISSES
brand
since 1907
milk chocolate
PER 9 PIECE SERVING
200 CALORIES
7g SAT FAT 35% DV
35mg SODIUM 1% DV
23g SUGARS
NET WT 12 OZ (340 g)
HERSHEY'S

Classic Bag
ALMONDS
ALMONDS
HERSHEY'S
KISSES
brand
since 1907
milk chocolate
with almonds
PER 9 PIECE SERVING
210 CALORIES
6g SAT FAT 30% DV
25mg SODIUM 1% DV
19g SUGARS
NET WT 11 OZ (311 g)
HERSHEY'S

Classic Bag
COOKIES
COOKIES
HERSHEY'S
KISSES
brand
since 1907
Cookies 'n' Creme
PER 10 PIECE SERVING
220 CALORIES
7g SAT FAT 35% DV
80mg SODIUM 3% DV
20g SUGARS
NET WT 10.5 OZ (297 g)
HERSHEY'S

13. Although the “Classic Bags” containing the different varieties of Hershey’s Kisses each set forth the actual net weight of product in small print on the bottom of the bag, consumers are not otherwise informed that the amount of Hershey’s Kisses product contained in the “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds is 8 1/3 percent less by net weight and the Hershey’s Kisses Cookies ‘N’ Crème is 12 1/2 percent less by net weight than the amount of product contained in the virtually same-sized “Classic Bags” containing the traditional Hershey’s Kisses Milk Chocolate.

14. Hershey is thus able to increase its sales by appealing to consumers’ desire for new and different Kisses products, while increasing its profit margins by filling its bags with up to 12 1/2 percent less product than is contained in virtually the same-dimension bags for its traditional Hershey’s Kisses Milk Chocolate product. Or stated otherwise, Hershey is able deceptively to charge a higher price for its specialty Kisses products sold in “Classic Bags” than it charges for its traditional offering, thereby imposing a premium that is not otherwise disclosed to consumers.

THE PARTIES

15. Plaintiff Christopher Huppert is a natural person of full age of majority who is domiciled and resides in Monroe, New York. Plaintiff has purchased “Classic Bags” of Hershey’s Kisses Milk Chocolate numerous times over the years, including recently at CVS and ShopRite in Monroe, New York. These “Classic Bags” contain 12 ounces (net weight) of Hershey’s Kisses. Plaintiff also has purchased at stores in the Monroe, New York area nearly identical dimension “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almond and Hershey’s Kisses Cookies ‘N’ Crème, expecting them to

contain the same net weight of product.

16. Plaintiff has subsequently learned that the "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds actually contain only approximately 11 ounces net weight of product, and "Classic Bags" of Hershey's Kisses Cookies 'N' Crème contain only approximately 10.5 ounces net weight of product.

17. Defendant Hershey is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 100 Crystal A Drive, Hershey, Pennsylvania. Hershey is the largest producer of quality chocolate and chocolate products in North America, and is a global leader in chocolate and non-chocolate confectionary. Hershey markets, sells, and distributes its products under more than 80 brand names in approximately 70 countries worldwide.

18. Hershey's Kisses products are sold through a variety of distribution channels and sales outlets throughout the United States as well as in the State of New York, including through supermarkets, mass merchandisers such as Walmart and Target Stores, grocery stores, convenience stores, club stores, supercenters, and drug stores.

JURISDICTION AND VENUE

19. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). Jurisdiction is proper because (1) the matter in controversy exceeds the sum or value of $5,000,000.00, exclusive of interest and costs and (2) the named Plaintiff and the Defendant are citizens of different states. 28 U.S.C. §1332(d)(2)(A).

20. Venue is proper in this Court pursuant to 28 U.S.C. §1391(a) because a

substantial part of the events giving rise to the claim occurred within this judicial district and because Defendant has marketed and sold the products at issue in this action within this judicial district and has done business within this judicial district.

CHOICE OF LAW

21. New York law governs the state law claims asserted herein by Plaintiff and a class of New York residents who purchased the Hershey's Kisses products at issue because Defendant's acts and omissions described herein were implemented in the State of New York through Defendant's marketing and sales of its products within the State of New York.

22. New York has a substantial interest in protecting the rights and interests of New York State residents against wrongdoing by companies which market and distribute their products within the State of New York.

GENERAL ALLEGATIONS

23. As alleged above, one of Hershey's flagship products, Hershey's Kisses Milk Chocolate, is packaged in a "Classic Bag" filled with 12 ounces (net weight) of Hershey's Kisses Milk Chocolate product.

24. But Hershey also offers "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds that look to be the same size and weight as the Classic Bags of Hershey's Kisses Milk Chocolate, but instead, are filled with only 11 ounces net weight of product – 8 1/3 percent less than the 12 ounces (net weight) that are filled in the Classic Bags of Hershey's Kisses Milk Chocolate product.

25. Similarly, Hershey offers "Classic Bags" of Hershey's Kisses Cookies 'N' Crème that look to be the same size and weight as the Classic Bags of Hershey's

Kisses Milk Chocolate, but are filled with only 10.5 ounces net weight of product – 12 1/2 percent less than the 12 ounces (net weight) that are filled in the Classic Bags of Hershey's Kisses Milk Chocolate product.

26. As a consequence, consumers are being misled into believing that they are buying a larger volume of Hershey's Kisses Milk Chocolate with Almonds and Hershey's Kisses Cookies 'N' Crème products than are actually contained in the "Classic Bags" of these products. And more significantly, consumers are unwittingly paying substantially more per ounce for the Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème product alternatives, allowing Hershey to collect a premium that it is otherwise failing to disclose to consumers.

27. For example, ShopRite has recently sold "Classic Bags" of Hershey's Kisses Milk Chocolate, net weight 12 ounces, for $3.99 – which translates to 33.25 cents per ounce. At the same time, ShopRite was selling both "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds, net weight 11 ounces, for the same $3.99 – which amounts to 36.27 cents per ounce, and Hershey's Cookies 'N' Crème, net weight 10.5 ounces, for the same $3.99 – which amounts to 38 cents per ounce. Yet consumers, seeing the three Hershey's Kisses "Classic Bag" products together on the grocery store shelf, are easily misled into believing that they are buying the same volume of Hershey's Kisses for the same price, regardless of which bag they purchase.

28. Unless consumers carefully study the net weight number set forth in small print on the front of the bag – and somehow realize that they are no longer receiving the same quantity of Hershey's Kisses as before – consumers are being misled by Hershey's deceptive practice of denominating similar size plastic bags of Hershey's

Kisses as “Classic Bags,” but filling the Cookies ‘N’ Crème variety “Classic Bag” with only 10.5 ounces net weight of product and the Milk Chocolate with Almonds variety “Classic Bag” with only 11 ounces net weight of product, leaving unknowing consumers to pay a price premium for the specialty alternatives.

29. Rather than provide consumers with the same 12 ounces of product and charge a higher price for the specialty alternatives, Defendant is deceptively keeping the price the same, and reducing the contents (by weight) of the bag. The net result is that Hershey is able to collect the premium it desires by deceiving consumers who reach for what they believe to be the same size bag they are accustomed to purchasing. Plaintiff and the class have been damaged thereby.

CLASS ACTION ALLEGATIONS

30. Applying New York substantive law, Plaintiff seeks to be appointed as class representative of a New York class composed of and defined as follows:

> All persons who bought “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds or Hershey’s Kisses Cookies ‘N’ Crème and did not resell them. Excluded from the Class are the Defendant and any Judge presiding over this matter and the members of his or her immediate family. Also excluded from this class are the legal representatives, heirs, successors, and attorneys of any excluded person or entity, and any person acting on behalf of any excluded person or entity.

31. As to the above class, this action is appropriately suited for a class action. Plaintiff is informed, believes, and thereon alleges, that the Class is sufficiently numerous such that a class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all purchasers of such “Classic Bags” of “specialty” Hershey’s Kisses is impractical.

32. This action involves questions of law and fact common to the Class. In

marketing the “Classic Bags” of specialty Hershey’s Kisses, Defendant has engaged in a systematic course of misrepresenting the products to consumers. Such common issues of law and fact include, but are not limited to:

- Whether the filling of visually similar sized bags of Hershey’s Kisses Milk Chocolate with Almonds and Cookies ‘N’ Crème with substantially less (up to 12 1/2 % less by weight) product than is contained in the “Classic Bags” of Hershey’s Kisses Milk Chocolate (12 ounces by net weight) was and is likely to mislead consumers;

- Whether Defendant represented that the “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds and Cookies ‘N’ Crème were of a particular standard or quality or net weight when they were not;

- Whether, as a result of Defendant’s misconduct, the Class is entitled to equitable and injunctive relief;

- Whether the Class members obtained the benefit of their bargain in purchasing “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds and Hershey’s Kisses Cookies ‘N’ Crème;

- Whether, as a result of Defendant’s misconduct, the Class is entitled to damages.

33. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and available remedies.

34. Plaintiff’s claims are typical of the claims of members of the Class, and Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff purchased “Classic Bags” of Hershey’s Kisses Milk Chocolate with Almonds and Hershey’s Kisses Cookies ‘N’ Crème and suffered an injury-in-fact as a result of Defendant’s conduct, as did all Class members who purchased any such “Classic Bags” of Hershey’s “specialty” Kisses. Plaintiff’s interests are coincident with and not antagonistic to those of the other members of the Class. Plaintiff is represented by counsel who is competent and

experienced in the prosecution of consumer class action litigation.

35. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated purchasers of the Hershey's Kisses products at issue to adjudicate simultaneously their common claims in a single forum in an efficient manner and without the duplication of effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by many members of the Class who could not afford individually to litigate the claims pleaded in this Complaint. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action.

FIRST CAUSE OF ACTION
(Violation of New York General Business Law Section 349)

36. On behalf of himself and the members of the New York Class, as defined in Paragraph 30 above, Plaintiff hereby realleges, and incorporates by reference as though set forth fully herein, the allegations contained in Paragraphs 1 through 35.

37. By denominating as "Classic Bags" Hershey's Kisses bags of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème filled with substantially less product (by net weight) than "Classic Bags" of Hershey's Kisses Milk Chocolate, Defendant has engaged in an unfair and deceptive business practice that has the capacity, tendency, and effect of deceiving reasonable consumers who purchase the products. Reasonable consumers would believe that "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème would contain the same quantity of product by weight as "Classic Bags" of Hershey's Kisses Milk Chocolate (12 ounces net weight). Defendant knew, or should have known, that by offering "Classic

Bags" of Hershey's Kisses Milk Chocolate with Almonds with only 11 ounces (net weight) of product and "Classic Bags" of Hershey's Kisses Cookies 'N' Crème with only 10.5 ounces (net weight) of product, while charging the same price as Hershey's Kisses Milk Chocolate filled with 12 ounces (net weight) of product, consumers would be misled into purchasing a substantially lesser quantity of Hershey's Kisses, and would unknowingly pay a premium in connection with their purchase.

38. Plaintiff and the Class have been aggrieved and have suffered losses as a result of Defendant's violations of Section 349 of the New York General Business Law. By virtue of the foregoing unfair, unconscionable, and deceptive acts in the conduct of trade or commerce, Plaintiff and the members of the Class have been substantially injured in the amount of the purchase prices for the "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème that they paid, or, in the alternative, have been damaged by paying more for the "Classic Bags" of Hershey's Milk Chocolate with Almonds and Cookies 'N' Crème that they purchased. Pursuant to GBL Section 349, Plaintiff, and his fellow Class members, are entitled to recover the greater of their actual damages, or fifty dollars, for each violation committed by Defendant.

39. Defendant continues to violate Section 349 of the New York General Business Law, and continues to aggrieve the members of the Class.

40. By reason of the foregoing, Defendant's conduct, as alleged herein, constitutes deceptive acts and practices in violation of Section 349 of the New York General Business Law, and Defendant is liable to Plaintiff and the Class for the actual and/or statutory damages that they have suffered as a result of Defendant's actions, the

amount of such damages to be determined at trial, plus treble damages, and attorneys' fees and costs. Plaintiff further demands injunctive relief enjoining Defendant from continuing to engage in, use, or employ any act, including advertisements, packaging, or other representations, prohibited by Section 349 of the New York General Business Law.

SECOND CAUSE OF ACTION
(Violation of New York's General Business Law Section 350)

41. On behalf of himself and the members of the New York Class, as defined in Paragraph 30 above, Plaintiff hereby realleges, and incorporates by reference as though set forth fully herein, the allegations contained in Paragraphs 1 through 40 above.

42. New York's General Business Law Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service."

43. Section 350 defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect." The section also provides that advertising can be false by omission, as it further defines "false advertising" to include "advertising [that] fails to reveal facts material in the light of such representations with respect to the commodity…to which the advertising relates."

44. Defendant's packaging, labeling, marketing, and advertising of its "Classic Bags" of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème are "misleading in a material respect," and thus constitute "false advertising," because by

packaging the Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème products in "Classic Bags" weighing substantially less than "Classic Bags" of the iconic Hershey's Kisses Milk Chocolate, Defendant falsely represents the quantity (by weight) of Hershey's Kisses Milk Chocolate with Almonds and Cookies 'N' Crème products that are contained in the bags.

45. Defendant continues to violate Section 350 of the New York General Business Law, and continues to aggrieve the members of the Class.

46. By reason of the foregoing, Defendant's conduct, as alleged herein, constitutes false advertising in violation of Section 350 of the New York General Business Law, and Defendant is liable to Plaintiff and the Class for the actual damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, statutory damages, plus treble damages, and attorneys' fees and costs.

47. Plaintiff further demands injunctive relief enjoining Defendant from continuing to engage in, use, or employ any act, including advertisements, packaging, or other representations, prohibited by Section 350 of the New York General Business Law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

1. Certifying this action as a class action as soon as practicable, with the class as defined above, designating Plaintiff as the named class representative, and designating the undersigned as Class Counsel.

2. On Plaintiff's First Cause of Action, awarding against Defendant the damages that Plaintiff and the other members of the Class have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus treble damages.

3. On Plaintiff's Second Cause of Action, awarding against Defendant the damages that Plaintiff and the other members of the Class have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus treble damages.

4. Awarding Plaintiff and the Class interest, costs, and attorneys' fees.

5. Enjoining Defendant from continuing to engage in, use, or employ any act, including advertisements, packaging, or other representations, prohibited by Sections 349 and 350 of the New York General Business Law.

6. Awarding Plaintiff and the Class such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: White Plains, New York
September 20, 2016

Respectfully Submitted,

/s/ Jeffrey I. Carton
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